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CHARLES ELMO

Supreme Court of the United States.

OCTOBER TERM, 1933.

No. [redacted] 4

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of the GOLTRA BARGE LINE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION.

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No. 870.

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vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of the GOLTRA BARGE LINE,
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On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION.

I.

OPINION OF COURT BELOW.

The petitioner's statement in her brief herein correctly states the facts under this division.

II.

JURISDICTION.

The jurisdictional facts stated in petitioner's brief herein are correct, with the exception that petitioner, under paragraph (3), undertakes to state certain facts and also undertakes to state the issues presented to the Supreme Court of Missouri. There is a variance as to the statement of these facts and issues, as will appear under respondent's statement of the case.

III.

STATEMENT OF THE CASE.

Petitioner filed her petition for damages against respondent in the Circuit Court of the City of St. Louis, Missouri, returnable to a term of said court prior to February 2, 1929, to which respondent entered a general demurrer, which was sustained by the Court. Petitioner then filed her amended petition, wherein, as to the material parts, she alleged: That on or about May 11, 1926, respondent, as "Goltra Barge Line," was operating on the Mississippi and Ohio Rivers as a common carrier transporting freight in interstate commerce and in that connection operated a certain vessel named "Iowa"; that deceased, John M. Warner, was at that time employed by respondent on the "Iowa" as captain or master, charged with the duties "required by custom and law of the duly

licensed captain or master of the 'Iowa' "; that the presence of the deceased, Warner, on board the "Iowa" in the capacity of captain or master, at that time, was required by Section 222, Title 46, of Mason's U. S. Code Annotated 1926, and as required by the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926 given the force and effect of laws; that on said day, although deceased, Warner, had a license to act as captain or master on both said rivers, he had no authority or license as a pilot to navigate the "Iowa" on the Ohio River; that respondent was required under aforementioned law, rules and regulations to employ a duly licensed pilot to operate and navigate the "Iowa" while in the Ohio River, and respondent had so complied therewith; that although deceased, Warner, on said day, was on board said "Iowa," acting in the course of his employment and scope of his duties as a captain or master, he was not and could not act as pilot, and he was not in actual operation, navigation and management of said "Iowa" on said date, but that these duties were then being performed by the pilot who was employed and engaged by respondent to serve on board said "Iowa," but who was not under the direction or control of deceased, Warner, and could not be in view of Section 28 of Rule 5 of the General Rules and Regulations prescribed by the Steamboat Inspection Service of the Department of Commerce; that on said day,

while deceased, Warner, was employed by respondent and was serving on board said "Iowa" as captain or master in the course of his employment for respondent, and while he was engaged in interstate commerce, and while the said "Iowa" was actually being used in interstate commerce, the respondent, by and through his servants and employes, was using said "Iowa" to tow and push several barges of freight from points in Pennsylvania to points in Louisiana; that at said time the water in the Ohio River was dangerously low, but under express instructions from respondent his servants and employes were ordered by respondent to continue said voyage; that when said "Iowa" and its barges reached a point in the Ohio River near Stevensport, Kentucky, some of the barges became grounded; that while said "Iowa" was being navigated, used and controlled "by agents, servants and employes of said defendant, other than said John M. Warner," to unground said barges, "the said agents, servants and employes of the defendant, other than the said John M. Warner, and independently of him and while said John M. Warner was not cognizant of exactly what was being done on all parts of the said 'Iowa,' so negligently, carelessly * * * handled * * * operated and navigated" said "Iowa" that they caused said "Iowa" to collide violently with the barges and the bank of the river; "that at this time the said John M. Warner was attempting to save his own life and the lives of those on board the said 'Iowa' and was attempting to save the

property of the defendant from further injury"; that as a result of said negligence and violent collision caused by the negligence of respondent, his servants and employes "other than the said John M. Warner," said Warner was thrown from said "Iowa" into the river and caused to drown (Rec. 3-6).

To this amended petition respondent filed a general demurrer, which was sustained by the Circuit Court of the City of St. Louis. This petitioner refused to further plead and judgment was entered against her on the pleadings. She appealed to the Supreme Court of Missouri (Rec. 1).

The respondent, in the Supreme Court of Missouri, presented the following issues:

> "1. Does 'Merchant Seaman,' as used in the title of the so-called 'Jones Amendment (June 5, 1920)' to the 'Merchant Marine Act,' Chapter 18, making the 'Federal Employers' Liability Act' applicable to 'Seamen' as well as to 'Employes' of railroads, and the term 'Seaman' as used in the act include the captain or master of a ship or vessel?
>
> "This question, presented, is contra to appellant's statement of the same proposition.
>
> "2. Do the allegations in the petition bring the case within the act, in that the petition fails to allege that the deceased, at the time of the injury or accident, was engaged in interstate commerce?"

The Supreme Court of Missouri sustained the Circuit Court of the City of St. Louis, upon the issues presented, and concluded:

"We do not believe that the master can be considered a seaman within the purview of sections 688 and 713, supra; the trial court properly sustained the demurrer to appellant's petition" (Rec. 17).

IV.

ANSWER TO PETITIONER'S SPECIFICATION OF ERROR.

The Supreme Court of Missouri did not commit error in so affirming the Circuit Court of the City of St. Louis, and correctly concluded that "We do not believe that the master can be considered a seaman within the purview of Sections 688 and 713" (of U. S. C. A., Title 46).

V.

SUMMARY OF ARGUMENT.

For convenience, respondent will follow the outline or summary of petitioner's brief herein filed.

A. *History and purpose of Section 33 of the Merchant Marine Act.*

Respondent agrees that it was the intent of Congress to promote the welfare of American seamen by enacting the "Merchant Marine Act" (Chapter 18), and that the amendments thereto (Section 33, Jones' Act, June 5, 1920) made the provisions of the Federal Employers' Liability Act applicable to seamen, but does not and cannot agree that Congress, by enacting section 33 intended the pro-

visions thereof to cover the master of a vessel or one who stands in the position of vice-principal, no more than it was the intent of Congress in the Federal Employers' Liability Act to extend the provisions thereof beyond the "employes" of railroads, and no more than it was a legislative intent to extend the Workmen's Compensation Acts or the Wrongful Death Statutes beyond the class designated for whose benefit such acts were passed.

The petitioner elected to bring her action under this act, although she had an adequate remedy under the state Wrongful Death Statute.

B. *Meaning of the language used in Section 33 of the Merchant Marine Act.*

Although petitioner had an adequate remedy for the death of her husband under the state Wrongful Death Statute, she attempted to bring herself under the provisions of section 33 by attempting to show and allege that at the time of the alleged collision the captain or master was not, at that moment, so engaged in order that he may be classified as a seaman, and so elected her remedy.

In her desire to bring herself within the provisions of section 33, by attempting to allege, at the time of the accident, her deceased husband was a seaman and not a captain or master, petitioner made certain allegations which takes her case from without another essential provision, namely, that the deceased, at the time of the accident, was engaged in interstate commerce.

While the remedial benefits of an act like section 33 will be liberally construed so as to give effect to those who are entitled to enjoy the benefits thereunder, still the act will be strictly construed as to persons seeking this benefit in determining the persons or classes of persons who are entitled to its benefits.

The courts, by judicial interpretation, will not read into this Act of Congress the inclusion of persons or classes of persons not clearly intended by Congress to be included, which would thereby enlarge the class of persons entitled to the benefits.

The Supreme Court of Missouri correctly decided that petitioner's second amended petition does not state a cause of action under the Federal Employers' Liability Act, as same is made applicable to "Seamen" under Section 33 (Jones' Amendment, June 5, 1920) of the Merchant Marine Act, and correctly affirmed the judgment of the Circuit Court of the City of St. Louis, in holding that petitioner is not entitled, under her allegations, to recover thereunder.

The Supreme Court of Missouri correctly interpreted and construed said Act of Congress in accordance with the well-known rules of construction, in accordance with accepted definitions of the terms "master" and "seaman," as used in the Merchant Marine Act, as defined by our courts, by legal text-writers, by standard dictionaries, and as defined by Congress in section 713 of the same chapter (Section 713, Title 46, Chapter 18, U. S. C. A., and Mason's

U. S. Code), and correctly held and decided that the master of a vessel cannot be included in the term "seaman" as used in section 33 (Section 688, Title 46, Chapter 18, U. S. C. A., and Mason's U. S. Code).

The Supreme Court of Missouri correctly held and decided that under the general rule in construing statutes or constitutions the court may resort to extraneous matters to aid in arriving at a correct interpretation when, and only when, the meaning of the words used is ambiguous or uncertain, but the words used under the act now being considered are not ambiguous or uncertain.

Even though said term "seamen" as here used were considered ambiguous or uncertain to warrant the Court resorting to hearings before the Senate Committee such extraneous matters would sustain the interpretation or construction thereof by the Supreme Court of Missouri.

Since the act applies only to similar cases as provided under the Federal Employers' Liability Act for personal injury or death resulting, the decision of the Supreme Court of Missouri does not deny to a master of a vessel the remedial rights granted by Congress to all other maritime employes, adversely affecting the health, safety and welfare of all masters of all vessels owned by citizens of the United States.

The Supreme Court of Missouri having correctly interpreted and construed the act under consideration and having correctly decided the issues here presented, the writ of certiorari should be denied.

VI.

ARGUMENT.

The decision of the Supreme Court of Missouri correctly held and decided that petitioner's second amended petition does not allege facts sufficient to state a cause of action under the Federal Employers' Liability Act, as same is made applicable to "Seamen" under the Jones Amendment, June 5, 1920, Section 33, to the Merchant Marine Act (Section 688 of Chapter 18, Title 46, U. S. C. A., and Mason's U. S. Code), and, therefore, the petition for writ of certiorari should be denied.

A. *History and Purpose of Section 33 of the Merchant Marine Act.*

Since petitioner seeks to bring her action under Section 33 of the Merchant Marine Act, and has so elected, instead of bringing her action under the State Wrongful Death Statute, and she now undertakes to justify her election by reviewing the history and purpose of said Act, respondent will give the history and purpose thereof.

The Federal Employers' Liability Act (35 U. S. St. At. L. 65, C. 149, 45 U. S. C. A. 51) was enacted to give to employes of railroads, engaged in interstate commerce, certain rights of action to recover damages for personal injury (or death resulting). Prior to 1920 the provisions of that Act were limited to employes of railroads and were not appli-

cable to seamen employed on boats or vessels (The Pawnee, 205 Fed. 333, 334).

On June 5, 1920, Section 33 was, by Act of Congress, made a part of Chapter 250 of 41 Statutes at Large, page 1007. The title of Chapter 250 is, "An Act to provide for the promotion and maintenance of the American Merchant Marine, to repeal certain emergency legislation and to provide for the disposition, regulation and use of property acquired thereunder and for other purposes."

Said Section 33, also known as the Jones Amendment, June 5, 1920, to the Merchant Marine Act, makes the Federal Employers' Liability Act, heretofore applicable to railroad employes exclusively, applicable to any seaman who shall suffer personal injury in the course of his employment, and to the personal representative of any seaman who meets his death as a result of any such personal injury.

This Section 33 became and is Section 688 of Chapter 18, Title 46 of the U. S. C. A. and of Mason's U. S. Code. Title 46 is designated "Shipping." Chapter 18 is entitled "Merchant Seamen."

Under the same Chapter and Title is Section 713, entitled "Definitions, Schedule and Tables," and indexed as "Definitions of Statutory Terms" (Section 713 of Chapter 18, Title 46, U. S. C. A. and Mason's U. S. Code). The terms "Master," "Seaman," "Vessel," "Owner" are herein separately and exclusively defined.

Respondent will elaborate upon the history and purpose

of Section 33 and reply to the balance of petitioner's brief under this subdivision in the following subdivision of his brief.

B. *Meaning of the language used in Section 33 of the Merchant Marine Act.*

The petitioner had a remedy for the death of her husband, Captain Warner, under the State Wrongful Death Statute, but concluded and elected to institute her action under Section 33 of the Merchant Marine Act (Section 688, Title 46, Chap. 18, U. S. C. A., also Mason's U. S. Code).

Her second amended petition, filed in the Circuit Court of the City of St. Louis (Rec. 2-6), discloses her apprehension as to being able to bring herself within the class of persons entitled to the remedy sought. A construction of the second amended petition clearly indicates that she was aware of the difference or distinction between a master of a vessel and a seaman. She pleads Section 222, Title 46, Mason's U. S. Code, to indicate that her deceased husband was required to be a licensed master and that the navigation of the vessel required the presence thereon of a licensed master as distinguished from a seaman. Said section 222, part of which is incorporated in said second amended petition, clearly indicates this distinction. The portion of said section not incorporated in said petition reads as follows:

"If any such vessel is deprived of the services of

any number of the crew, including certified lifeboat men, separately stated, without the consent, fault or collusion of the master, owner or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage; provided that the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill."

This is further demonstrated by pleading the rules and regulations of the Steamboat Inspection Service of the Department of Commerce, which rules and regulations are, by Section 375 of Title 46 of Mason's U. S. Code Annotated 1926, given the force and effect of laws.

Section 28 of the Rules and Regulations of the Steamboat Inspection Service of the Department of Commerce, referred to and relied upon, is entitled "Masters of River Steamers," and specifically provides for the inspection and examination of all applicants for original license as masters of steamers navigating rivers exclusively, and therein sets forth a schedule for the character of examination of applicants for original license as master of river steamers and therein provides for the examination as to his general knowledge of the duties of master, his ability to handle the wheel in case of emergency or disaster, his knowledge of proper management of a vessel and crew in

case of collision, and as to his executive ability generally to manage officers and crew.

She also pleads therein Section 224, Title 46 of Mason's U. S. Code Annotated 1926, which falls under the general title "Shipping," under chapter 11 thereof, entitled "Officers and Crews of Vessels," and said section 224 is entitled "Licenses of Officers by Inspectors." Said section provides for a board of local inspectors, who shall license and classify the masters, chief mates, second and third mates, etc.

Realizing her difficulties to bring herself within the class of persons, "seamen," entitled to the remedies under section 33, she studiously attempts to circumvent and alleges that her husband was the captain or master of the particular vessel, but not in charge thereof at the particular moment of the collision or accident, by first alleging that, although the deceased was the licensed master in charge of the "Iowa" on this trip of navigation over the Ohio and Mississippi Rivers, he was not a licensed pilot at that time for navigation on the Ohio River, and then undertakes to, and does, allege that at the particular time of the collision or accident the duly licensed pilot was operating and navigating said vessel, and specifically alleges that "he was not in charge of the actual operation, navigation and management of the said 'Iowa' on said date," and further alleges "that while said 'Iowa' was being navigated, used and controlled by the agents, servants and employes of said defendant, other than said John M.

Warner, to unground the said barges * * *, the said agents, servants and employes of the defendant, other than the said John M. Warner, and independently of him, and while said John M. Warner was not cognizant of exactly what was being done on all parts of said 'Iowa' * * * that at this time (the exact time of the collision) the said John M. Warner was attempting to save his own life and the lives of those on board of the said 'Iowa' and was attempting to save the property of the defendant from further injury."

It is apparent, therefore, that the petitioner was making a studious effort to bring herself within the provisions of section 33 after realizing the distinction made between a master and a seaman under provisions of this act. In her attempt to bring herself within the provisions of said section 33, she undertakes to allege the above additional facts which take her from under another essential provision of the act, namely, that it is not sufficient to allege and prove that the defendant, at the time of the accident or injury, was engaged in interstate commerce, but that the plaintiff, at the time of the accident or injury, was engaged in interstate commerce. By these allegations the petition fails to bring the deceased within this provision. There are no affirmative allegations to show in what capacity, if any, the deceased was employed at the particular time of the collision or accident, nor are there any affirmative allegations as to his duties at the particular time, but, on the contrary, the allegations negative the idea that the

deceased was, at that time, engaged in interstate commerce. Section 33, relied upon, provides "that any seaman who shall suffer personal injury in the course of his employment, may, at his election, maintain an action for damages." Nothing is here alleged to the effect that he was injured or killed while in the course of his employment at the particular time. Nothing is alleged as to the duties he was then performing under said employment. On the contrary, by negative allegations and by natural and justifiable inferences, the deceased at the time was not engaged in the course of his employment as captain or master of the vessel and, therefore, not engaged "in the course of his employment" in interstate commerce.

In deciding a case under the Federal Employers' Liability Act, the Supreme Court of South Carolina, in **Thornhill, Admx., v. Davis,** Director General, 113 S. E. 370, 24 A. L. R. 617, 625, held:

> "The contention that both the carrier and the employe must be engaged at the time of the injury in interstate commerce is supported by the decisions construing the following language of the Act, 'every common carrier by railroad, while engaged in commerce between any of the several states * * * shall be liable for any damages to any person suffering injury while he is employed by such carrier in such commerce.'"

The Supreme Court of Missouri, in a very similar case, Elliott v. Payne, 239 S. W. 851, 23 A. L. R. 706, held:

> "There is not a word of direct testimony as to why or for what purpose the deceased left his moving engine. The cases (both federal and state) all held that the burden is upon the plaintiff to show the servant was about the business of the master at the time of the injury. Without this pleading and proof there can be no recovery."

Also see Barry v. Hannibal and St. J. Railway Co., 98 Missouri, 62, 70.

While the remedial benefits of section 33 will be liberally construed so as to give effect to those who are entitled to enjoy the benefits thereunder, still the act will be strictly construed as to persons seeking this benefit in determining the persons or classes of persons who are entitled to its benefits, and the courts, by judicial interpretation, will not read into this Act of Congress the inclusion of persons or classes of persons not clearly intended by Congress to be included, which would thereby enlarge the class of persons entitled to the benefits. The question presented involves the construction and interpretation of an Act of Congress of the United States, namely, the Jones Amendment, June 5, 1920, to the Merchant Marine Act, being Section 33 of Chap. 250 of 41 St. at L., page 1007, and also Section 688 of Chap. 18, Title 46, of U. S. C. A. and of Mason's U. S. Code. The aforesaid amendment amended Chap. 18 of the Merchant Marine Act and is subtitled "Merchant Seamen." The purpose of the amendment was to make the Federal Employers' Liability Act applicable to seamen.

It is not a question whether Congress intended to exclude masters of vessels and their personal representative from the remedial benefits under section 33, but rather whether the courts can now read into the act that Congress intended to include masters of ships, under the provisions of this act wherein Congress refers only to "seamen," and wherein, under another section, Section 713 of Chap. 18, Title 46, U. S. C. A., and Mason's U. S. Code, entitled "Merchant Seamen," Congress specifically and separately defines the term "master," and then, by the conjunction "and," defines the term "seaman."

Since this action seeks to recover for the wrongful death of Captain Warner, and since such rights, purely statutory, are in derogation of the common law, the same must be strictly construed.

While the remedial benefits of the statute shall be liberally construed so as to give effect to those who are entitled to enjoy the benefits thereunder, still the act must be strictly construed as to the persons entitled to its benefits and as to conditions of employment to bring the person or the deceased within its provisions to enjoy said benefits.

The same general rules of construction apply to this phase of the Federal Employers' Liability Act, the Jones' Amendment (Section 33) to the Merchant Marine Act, as in the case of the construction of the Wrongful Death Statutes.

The Washington Supreme Court (in banc), in the case

of **Whittlesey et al. v. City of Seattle**, 163 Pac. 193, L. R. A. 1917 D 1084, held:

> "Some courts have held the Wrongful Death Act, which, in some form, is common to all the states (3 Shearm. & Redf. Neg., Appx., p. 2051 et seq.), to be in derogation of the common law, and therefore to be construed strictly. Others have held the act to be remedial, and have construed it liberally. But, having in mind our own decisions, we agree with Judge Cooley, who suggests the correct rule: 'That such statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit, and a liberal construction in applying the statute in their favor' (1 Cooley, Torts [3d ed.] 553),"

and therein further held:

> "That a statute giving a right of action that did not theretofore exist would not be extended by construction beyond the class or classes specifically mentioned therein."

The Supreme Court of Missouri, in Bates v. Sylvester, 205 Mo. 493, 506, in reaching its conclusion, interpreting and construing the Death Statute of Missouri, cited and approved the following:

> "This same question has received the consideration of the Supreme Court of Indiana in Hamilton v. Jones, 125 Ind. 176 (1890), and Mitchell, J., with great care and discrimination reviewed the cases of Hegerich v.

> Keddie, Yertore v. Wiswall, Cregin v. Railroad, Russell v. Sunbury, already noted, and Moe v. Smiley, 125 Pa. St. 136, and Ott v. Kaufman, 68 Md. 56, and disapproved Yertore v. Wiswall, as the Supreme Court of Ohio and the Court of Appeals of New York have, and reached the conclusion 'that statutes in derogation of the common law are to be strictly construed, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by the statute must present a case clearly within the statute which creates the right. The language of section 284 seems to repel any implication that the personal representatives of one whose death has been caused by the wrongful act or neglect of another might maintain an action against the administrator or other personal representative of the wrongdoer.' "

To the same effect see **Troll v. Gas Light Company**, 182 Mo. App. 600, 604.

While not exactly in point, still there is some analogy between the construction of the Workmen's Compensation Statute and the construction of this act which may assist in determining this question.

In **Skouitchi v. Chic Cloak & Suit Company**, 230 N. Y. 296, 130 N. E. 299, 15 A. L. R. 1825, wherein the Court explains its former decision of Bowne v. S. W. Bowne Co., 221 N. Y. 28, 116 N. E. 364, wherein an action was brought by the president and principal stockholder of a corpora-

tion for damages growing out of personal injuries sustained, and the Court therein concluded: "We simply held that 'the higher executive officers of a corporation are not, as such, its employes in the ordinary use of the word' (221 N. Y. 30)."

In construing section 33, under which petitioner seeks to recover, the Supreme Court of Missouri considered Section 713, Title 46, U. S. C. A., and Mason's U. S. Code, wherein Congress defines certain terms as used in this chapter. Section 713 is entitled "Definitions, Schedule and Tables," and falls under the subdivision entitled "Definitions of Statutory Terms."

Under this section the terms "master," "seaman," "vessel" and "owner" are separately defined.

This section, without any other interpretation necessary, clearly distinguishes a "master" from a "seaman" as much as it does a "vessel" from the "owner" or the "master" from the "owner" or the "owner" from a "seaman," and specifically defines each one.

Congress clearly defines four terms, namely, master, seaman, vessel and owner. Where one is defined in one clause to the exclusion of the other, there is no necessity of again excluding the same from the other clause defining another classification. In the first clause Congress defines "master" to the exclusion of the other members of the crew, as one separate and distinct from the others. The master is distinctly defined as "having command of any vessel," and that such person "shall be deemed to

be the 'master.'" In other words, Congress defined him as a vice-principal in complete charge and command of the vessel and of the balance of the officers, men, etc., on board. He was thereby clearly distinguished and separated by distinction and classification, from the crew and from the term "seaman." That being true, there was no necessity of further excepting the master or classifying him in the second classification or clause. It is true, in the second classification, Congress excepted "apprentices," but these were not defined in any other part of this section. Had "apprentices" been separately defined, like "master," "owner" and "vessel," then Congress would not have made the exception under that clause.

Although the above is sufficiently conclusive and decisive, still we may approach the construction of this section (section 33) in the following manner, so as to distinctly show that the term "seaman," as used in said section, was not intended to include "masters," even though Congress had not, by statute, defined these terms.

The term "seamen" has been defined time and time again and in all definitions, where the term is used as set forth in the act under consideration, the "captain or master" is not included in the term "seamen" and the "master" is not termed a "seaman."

Starting with the English cases, we find laws similar to the act under consideration, wherein the terms shall be defined as above indicated.

In The Arina, 12 P. & D. 118, 123, the Court said:

> "By the interpretation clause of the Merchant Shipping Act 1854 (S2) the term 'seaman' is defined as follows: 'Seaman shall include every person (except masters, pilots and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship.' "

And in Connor v. "Flora," 6 Can. Exch. 131, 132, the Court, in construing the Merchant Shipping Act and the Inland Water Seamen's Act, said:

> "The interpretation clause defines 'seamen' as every person employed or engaged in any capacity on board any ship, except masters or pilots."

The same definition is given by the Court in Corbett v. Pearce (1904), 2 K. B. L. T. Rep. (n. s.) 781, 20 T. L. R. 473, in construing the Employers' Liability Act and the Employers and Workmen Act.

Similarly we find that all persons employed in the navigation of a ship or upon a voyage other than master or mate, are to be deemed seamen within the provisions of the Civil Code of California 1903, Sec. 2049.

The various dictionaries define the term as follows:

> Century Dictionary: "A man whose occupation it is to co-operate in the navigation of a ship at sea; a mariner; a sailor; applied to both officers and com-

mon sailors, but technically restricted to men below the rank of officer."

Black's Law Dictionary: "Sailors; mariners; persons whose business is navigating ships, commonly exclusive of the officers of a ship."

In 35 Cyc, at pages 1178, 1179, 1180 and 1181, "seamen" is defined:

> "A seaman is defined to be one whose occupation is to assist in the management of ships at sea; a mariner; a sailor. The term is exceedingly broad in its signification and is held to include carpenters, clerks, cooks, coopers, deckhands, divers, engineers, firemen, fishermen, mates, pilots, porters, pursers, sailsmen, sealers, slaves hired as seamen, stewards and wreckers. It does not include, however, lightermen plying within a harbor on a vessel under twenty tons burden, nor does it include masters, musicians, raftsmen, or the servants of the master."

And the term "crew" is then defined:

> "The crew of a vessel in a general sense comprises all persons who in pursuance of some contract or arrangement with the owner or master are on board the same, aiding in the navigation thereof. The term includes the cook, the mate, and the engineer, but the bookkeeper of a steamboat, who performs such service wholly on shore and renders no service on board the boat, and is generally held to exclude the master, who is held to be rather in the nature of the owner than a seaman."

It has been repeatedly held that a master is not a seaman in the matter of admiralty liens for wages as is given to seamen.

In the M. Vandercook, 24 Fed. 472, 475, the Court said:

> "I am of the opinion that, under the circumstances of the case, the libelant must be treated as the master, and that his claim for wages is not an admiralty lien."

In the case of The Marie, 49 Fed. 287, in determining the right of wages due from a vessel owned by a foreign country, the Court said:

> "By the treaty the consuls of either nation have a right to sit as judges and arbitrators in such differences as may arise between the captains and crews of vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities.
>
> "The words 'crews of the vessels,' as here used, include all of the ship's company—all the seamen and officers, except the captain."

The Court, in Gonzales v. U. S. Shipping Board etc., 3 Fed. (2d) 168, construing and defining the terms "seamen" and "vessel," said:

> "The same section of the statutes above referred to, Section 8392 of the Compiled Statutes, that defines a 'seaman' defines the term 'vessel.' As we have seen, a 'seaman' is one employed on a 'vessel.' And this section says: 'A "vessel" shall be understood to com-

prehend every description of vessel navigating on any sea or channel, lake or river.' The Standard Dictionary defines a 'seaman' as: 'One not an officer who takes part in the practical navigation of a vessel—a sailor.' It defines a 'sailor' as 'one whose occupation is to aid in navigating a vessel, especially one of the crew.' ''

In The Atlantic, 53 Fed. 607, 608, the Court said:

"It is a puzzling question whether libelant stood in the place of the master or not. He was employed by respondent, looked to him for his wages, was paid by him, was under the control of no one but him, and in these respects came within many of the reasons given for refusing the master his lien (Drinkwater v. The Spartan, 1 Ware 158; The Eolian, 1 Biss. 321). On the other hand, he had none of the responsibility or power of a master, never had any independent authority, did not get continuous wages, but was paid only when his engine was at work. Upon the whole, I am of the opinion that he cannot be treated as a master of a vessel. He was master in no maritime sense. He was employed because he was an engineer, and his chief duties were to run the engine. For this reason his pay ceased when his engine stopped. His position on this dredge was analogous to that of a sailing master on a yacht, and it has been held that he is not a master."

It is true that where there is nothing in the context or statute to define or show the sense in which the word is used the term "seaman" has been held to include "mas-

ter," such as the right to become citizens, to make nuncupative or unwritten wills, and in certain criminal cases, but in none of these cases is the question of negligence charged to an inferior officer or sailor who is under the direct orders and command of the master, nor does any of these cases involve the control of the vessel which is under the direct charge of the master. Not one of these cases has to do with an act of Congress where the terms "master" and "seaman" are defined.

But it must also be remembered that in construing this act we must keep in mind the general law of master and servant, to the effect that the master is not liable for any injury to the superior resulting from the negligence of his subordinate.

In McGrory v. Ultima Thule A. & M. R. Co. (Ark.), 118 S. W. 710, 23 L. R. A. (n. s.) 301, 303, which was an action for damages by the superintendent, the Court said:

> "According to the undisputed facts the plaintiff was a vice-principal of the defendant at the time of the injury, and the negligence of the employe, if any, which caused the injury, was that of one of his subordinates. Is the master responsible to a vice-principal on account of the negligence of another of its servants, who is a subordinate of the vice-principal and under the latter's control? It is plain that the master is not responsible, for that is one of the ordinary risks which the servant assumes when he takes service and assumes control over his subordinates. The master is not bound, under the doctrine of

respondeat superior, to indemnify one servant for an injury caused by the negligence of another servant in the same common employment, unless the negligent servant is at the time acting as the master's representative; in other words, the vice-principal of the master (2 Labatt, Mast. & S., Sec. 470; Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397). The subordinates of the vice-principal, over whom he exercises control, are his fellow servants in a common employment, so far as the responsibility of the master to him for their acts is concerned, and the master discharges his full duty to his vice-principal by exercising ordinary care in selecting competent subordinate servants."

This superiority is more pronounced in the matter of navigation, because the captain or master of a vessel has control of every department of service on board, and it is his duty personally to see to the course of his vessel, and to see that the officers and crew under him properly perform their assigned duties in respect to the navigation of the vessel, even in local waters where the vessel, for the time being, is in charge of a local pilot, and if there is any misconduct or neglect he is responsible civilly (36 Cyc 132).

To show some of the duties and responsibilities of the master of a vessel we quote from Union Insurance Co. v. Dexter, 52 Fed. 152, 153, 155:

"Upon the hearing of the present case the facts proved are substantially the same as before, except that it does not appear that at 5 p. m., before the

stranding, the position of the steamer was accurately ascertained. The master now testifies, on the contrary, that he had not obtained any accurate observation since the previous noon. The additional testimony taken in behalf of the respondent shows in general the dangerous nature of the coast; that a prudent navigator, in going on the westward side of Old Providence Island in the nighttime, would intend to give it a berth of about six miles, which the respondent testifies he also intended; that the haziness of the atmosphere at that time made the estimate of the distance of land deceptive; that the currents of that region, depending upon the strength of the wind, usually run about north or northwest, varying from half a knot to two knots, or sometimes even more, and that up to the line of the coral reefs the water is so deep as to make soundings for the most part impracticable."

In that case the Court held:

"I must hold the master remiss in his duty, both for not taking a course more to port, which a proper consultation of his chart would have shown to be necessary on his own estimate of his position, and also for not correcting his erroneous estimate of position by observations with the alidade. For losses resulting from such neglect, either to ship or cargo, the master is directly responsible to the persons injured and to the libelant by subrogation on its payment of the insurance (Story, Ag., par. 314, 315)."

The Supreme Court of Missouri, therefore, correctly interpreted and construed said Act of Congress in accord-

ance with the well-known rules of construction, in accordance with accepted definitions of the terms "master" and "seamen" as used in the Merchant Marine Act, as defined by our courts, by legal text-writers, by standard dictionaries, and as defined by Congress in section 713 of the same chapter (Section 713, Title 46, Chap. 18, U. S. C. A., and Mason's U. S. Code), and correctly held and decided that the "master" of a vessel cannot be included in the term "seamen" as used in section 33 (Section 688, Title 46, Chap. 18, U. S. C. A., and Mason's Code).

Petitioner herein, in opposition to said decision of the Supreme Court of Missouri, can get little or no comfort by the process of reasoning adopted in quoting Section 20 of the so-called La Follette Seaman's Act, and the case of Chelentis v. Luckenbach Steamship Company, 247 U. S. 372, 384, 385, 62 L. Ed. 1171, 1177, nor in her claim that, although the above referred to section 713, wherein Congress defines certain terms, is part of the same title and the same chapter in the U. S. C. A. and in the Mason's U. S. Code, is derived from and based upon Section 65 of the Act of June 7, 1872 (C. 322, s. 65, 17 Stat. 277).

We cannot agree with the petitioner that the language of section 65 is so materially different from section 713 as to constitute any material variance. On the contrary, the definitions and the manner of defining the various terms are identical.

The Chelentis case cited, supra, was not an action by the captain or master, nor did it involve the right of a

master to recover. The action was by a fisherman, instituted as a common-law action for personal injury damages based upon an alleged improvident order of his superior officer, as distinguished from an admiralty action for care, maintenance and loss of wages. The Court denied the relief because

> "Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

Assuming that the Senate committee's attention had been directed to this case, it could only be for the purpose of giving common-law relief to the employes or seamen, and had no bearing on the question of differentiating between the commanding officer or master and his seamen.

Neither can petitioner hope to receive comfort out of the case of **International Stevedoring Co. v. Haverty**, 272 U. S. 50, 52, 71 L. Ed. 157, 160, for the purpose of showing that the Court considered the term "seamen" flexible enough to include stevedores, and, therefore, we should extend the flexibility, in this instance under section 33, so as to extend it to include the term "master" under the term "seamen." Cases of a similar import are cited by petitioner for the same purpose. However, an examination of these cases disclosed the Court's reasoning. In the International Stevedoring case, supra, the Court gave its reasons for so extending the term by showing that the steve-

dore in that case was, at the time, performing duties formerly performed by the ship's crew or seamen, and since they were now performing the same kind of work they should be entitled to the same protection and to the same remedies.

The petitioner also cites and quotes from In re Scott, 250 Fed. 647, which case is based upon a declaration of a foreigner, a master, to become a citizen of the United States under the Naturalization Act provided for seamen, as foreigners, to become citizens. Clearly the construction of such an act would not be like the one under consideration. As previously pointed out, there are instances where the term "seamen" is broad enough to cover masters, namely, in matters of naturalization, protection against criminal and felonious assault, matters relative to certain military duties, pertaining to care, maintenance and loss of wages while upon the high seas, and matters going to the validity of nuncupative or unwritten wills. The Court, however, in the above Scott case, recognized the distinction by the following language:

> "It is manifest that the word 'seaman' might be used in different enactments in different senses, and the intended sense might appear from the context."

We are not unmindful of the fact that Congress, in Section 33, gave to a class, seamen, employes, and members of the crew, a right or remedy not enjoyed at common law, and, furthermore, Congress, in view of this granted remedy, specifically defined the terms therein used.

The petitioner entirely overlooks the real purpose of the Act as being that to protect the men or the employes, and not the chief executive officer, the commander or the master, who stands in the position as a vice principal. In considering the cases cited by petitioner to substantiate the position that our Courts have construed the term "seamen" to include "master," we must keep in mind the nature of the causes of actions decided by the Courts as compared with the nature of petitioner's cause of action, which is based upon allegations of negligence and upon the theory of recovery for personal injuries or death resulting through the carelessness and negligence of the respondent's servants who are directly under and subject to the direct orders of the master of the vessel as a vice principal.

The Balsa, 10 Fed. (2d) 408, cited by petitioner, was not one growing out of common-law negligence, nor did it involve the construction of statutory law, but was one in admiralty, for the recovery of the costs of cure and maintenance.

Before giving weight, as petitioner does, to the quotation from Nogueria v. N. Y. N. H. & H. R. Co., 32 Fed. (2d) 179, and 281 U. S. 128, 74 L. Ed. 754, we must ascertain what facts were before the Second Circuit Court of Appeals and the Supreme Court of the United States, and what question was to be determined. Neither court was called upon to determine whether the term "seamen" included "master", and neither so decided. That was an action by a freight handler and the question arose whether his remedy was under the "Jones Amendment" or under

the Longshoremen's and Harbor Workers' Compensation Act. Nor is the petitioner justified in inferring that this Court thereby inferred that the "master" had his remedy under the so-called Jones Act or Jones Amendment (Section 33).

There is no dispute and there is no question but that this petitioner had a remedy for the death of her husband, if the facts justify the same, but she has elected the wrong remedy and cannot maintain this action under this section.

Without reviewing each of the various cases cited by the petitioner, we may state that those above referred to fairly well disclose the trend of all that have or can be cited.

We again repeat that the petitioner has failed to show wherein the Supreme Court of Missouri is in error in holding that this petitioner is not entitled to recover in this action, and we again affirm that the writ should be denied.

The Supreme Court of Missouri correctly held and decided that under the general rule in construing statutes or constitutions, the Court may resort to extraneous matters to aid in arriving at a correct interpretation when, and only when, the meaning of the words used is ambiguous or uncertain, but the words used under the Act now being considered are not ambiguous or uncertain.

In view of that conclusion the Supreme Court refused to consider the matters referred to by the petitioner herein in her brief under subdivision (A) on page 13 of her brief, referred to as United States Senate hearings on the establishment of a Merchant Marine, pp. 1628, 1709 and 1712.

Even though the Supreme Court of Missouri had been inclined to have considered such extraneous matters as above referred to, it could not have sustained the petitioner's position and would not have been justified in construing section 33 to mean that the term "seaman" included the term "master."

The Senate hearings, 1919-1920, were before its Committee on Commerce under the general subject "Merchant Marine" and are contained in part II, Vol. 143, consisting of 2,089 pages, and cover the entire subject of merchant marine for the purpose of gathering facts regarding the shipping situation for the purpose of establishing an American merchant marine.

There appeared before this committee the American Manufacturers' Export Association, ship builders, exporters, brokers, agents for steamship lines, National Association of Masters, Mates and Pilots, the International Seamen's Union of America and other interested individuals and organizations. Each organization furnished facts concerning the members of the particular organization. By way of example, the Association of Masters furnished evidence as to the masters, mates and pilots, while the Seamen's Union furnished facts concerning the welfare of the employes or seamen.

It will become apparent upon reading all of these proceedings that, on all occasions, there was a clear distinction drawn between the master and the officers of a vessel and the employes, seamen, or crew.

By way of illustration, we quote from the testimony of Captain Abernathy, page 674 of said record, as follows:

> "The Chairman: Will you state right there, as a master, what the ordinary work is of seamen on steamers?
>
> Captain Abernathy: Simply to keep the vessel up, keep the ship clean, keep the cargo gear in order—that is all. On the Atlantic Coast the sailors do not work freight; have nothing to do with the freight; simply to keep the ship in order."

At page 676 Captain Abernathy testified:

> "The Chairman: The men down in the fire room, engine room, etc., are not seamen?
>
> Captain Abernathy: No, sir.
>
> The Chairman: They are not classed as seamen?
>
> Captain Abernathy: They are seamen under the law, but they are different from the deck crew. We call the deck crew seamen. Within the meaning of the law everyone goes to sea outside of the master is a seaman.
>
> The Chairman: That is what I want to get, under the meaning of the law how many are there on your cargo ship?"

Petitioner herein, apparently, undertakes to rely entirely upon the testimony of one witness before said committee, Mr. Furuseth, who was a member of, and testified in behalf of, the International Seamen's Union of America. By examining his testimony we find that he testified, at page 1712, as follows:

"Senator Fletcher: In other words, under the common law, if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy?

Mr. Furuseth: He would have no remedy.

Senator Fletcher: And now you want to change that so that he could have a remedy, provided his own negligence did not bring about the injury?

Mr. Furuseth: That is it, exactly."

Other citations of a similar character could be given from this record, but this is sufficient to show that the Supreme Court of Missouri could have got very little comfort in trying to determine that Congress intended to include masters under the term "seamen."

CONCLUSION.

Since the Supreme Court of Missouri has properly and correctly held and decided that this petitioner is not entitled to recover under her second amended petition, filed as the basis of her cause of action, and since the Supreme Court has properly and correctly held and decided that a master is not a seaman, under the provisions of said section 33, and since the terms and language of said section 33 are clear, certain and unambiguous, there is no necessity for a review of this case by this Court, and, therefore, the writ of certiorari should be denied.

JOSEPH T. DAVIS,
Counsel for Respondent.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 870

CLAIRE A. WARNER, Administratrix of the Estate of JOHN M. WARNER, Deceased,
Petitioner (Appellant Below),

vs.

EDWARD F. GOLTRA, Doing Business Under the Style and Name of THE GOLTRA BARGE LINE,
Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

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Respondent.

BRIEF OF RESPONDENT ON THE MERITS.

STATEMENT OF THE CASE.

Since the question raised on a general demurrer to petitioner's second amended petition in the Circuit Court of the City of St. Louis, Missouri, and similarly raised in the Supreme Court of Missouri, was based upon the proposition: